

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

DAVID STALHEIM, DAN McSHANE, ERIC
HIRST, WENDY HARRIS, TODD DONOVAN,
SUE BROWN, JOHN AND KAREN
STEENSMA, LAURA LEIGH BRAKKE, DEAN
MARTIN, AND FUTUREWISE,

Case No. 10-2-0016c

ORDER FINDING COMPLIANCE

Petitioners,

v.

WHATCOM COUNTY,

Respondent,

And,

CITY OF FERNDALE AND ANCHOR
MANOR, LLC,

Intervenors.

This matter comes before the Board following the submittal of Whatcom County's Compliance Report. The Compliance Report describes the actions Whatcom County (the "County") took in response to the Board's April 11, 2011 Final Decision and Order (FDO).

I. PERTINENT PROCEDURAL HISTORY

The matter came before the Board at a Hearing on the Merits on March 11, 2008.

On April 11, 2011 the Board issued its FDO and, while finding the Petitioners had not carried their burden on proof with regard to certain issues, found the County out of compliance with the Growth Management Act (GMA) in several regards, including:

- The County oversized the Ferndale UGA, in violation of RCW 36.70A.110(2).¹
- In the absence of capital facilities plans for fire and wastewater, the Ferndale UGA lacked “adequate existing public facility and service capacities to serve such development” in violation of RCW 36.70A.110(3).²
- The County erred in its analysis of the land needed for the Ferndale UGA by utilizing both a market factor and a consideration of “local circumstances”. It further erred in approving the Ferndale UGA without current fire and sewer capital facilities in place. Consequently, the County’s actions created an inconsistency between its UGA Reserve Criteria and its Comprehensive Plan map in violation of RCW 36.70A.070 (preamble).³
- The County failed to comply with the provisions of RCW 36.70A.070(3) which sets forth the necessary elements of a capital facilities plan.⁴

Following the issuance of the FDO, the County filed a Compliance Report on August 22, 2011.

On September 6, 2011 Petitioner Futurewise filed its response to the Compliance Report in which it indicated it had no objection to a finding of compliance as to the Ferndale UGA.

On September 7, 2011, Petitioners Stalheim et al. filed their response to the Compliance Report in which they too indicated they had no objection to the compliance report and had no objection to the Board making a finding of compliance in this case.

On September 28, 2011, the Board held a telephonic compliance hearing. Petitioners Martin et al. were represented by Barbara Dykes and Tom Ehrlichman. Futurewise was

¹ FDO at 16.

² Id. at 36.

³ Id. at 44.

⁴ Id. at 56.

1 represented by Tim Trohimovich. Karen Frakes represented the County. All three Board
2 members attended.

3 4 II. BURDEN OF PROOF

5 After a board has entered a finding of non-compliance, the local jurisdiction is given a period
6 of time to adopt a legislative enactment to achieve compliance. RCW 36.70A.300(3)(b).

7 After the period for compliance has expired, the board is required to hold a hearing to
8 determine whether the local jurisdiction has achieved compliance. RCW 36.70A.330(1) and
9 (2). For purposes of board review of the comprehensive plans and development regulations
10 adopted by local governments in response to a non-compliance finding, the presumption of
11 validity applies and the burden is on the challenger to establish the new adoption is
12 clearly erroneous. RCW 36.70A.320(1),(2) and (3).

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15 In order to find the County's action clearly erroneous, the Board must be "left with the firm
16 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
17 121 Wn.2d 179, 201, 849 P.2d 646 (1993). Within the framework of state goals and
18 requirements, the board must grant deference to local governments in how they plan for
19 growth:

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21 In recognition of the broad range of discretion that may be exercised by counties
22 and cities in how they plan for growth, consistent with the requirements and goals
23 of this chapter, the legislature intends for the board to grant deference to the
24 counties and cities in how they plan for growth, consistent with the requirements
25 and goals of this chapter. Local comprehensive plans and development
26 regulations require counties and cities to balance priorities and options for action
27 in full consideration of local circumstances. The legislature finds that while this
28 chapter requires local planning to take place within a framework of state goals
29 and requirements, the ultimate burden and responsibility for planning,
30 harmonizing the planning goals of this chapter, and implementing a county's or
31 city's future rests with that community.
32 RCW 36.70A.3201 (in part).

31 In sum, the burden is on the Petitioners to overcome the presumption of validity and
32 demonstrate that any action taken by the County is clearly erroneous in light of the goals

1 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
2 Where not clearly erroneous and thus within the framework of state goals and requirements,
3 the planning choices of the local government must be granted deference. It should be
4 noted that, in this compliance proceeding, the Petitioners do not object to a finding that the
5 County has cured the areas of non-compliance with the GMA identified in the April 11, 2011
6 FDO.
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8 **III. ISSUE PRESENTED**

9 Whether the County has achieved compliance with the GMA with regard to those areas
10 found to be non-compliant in the Board's April 11, 2011 FDO?
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12 **IV. DISCUSSION**

13 The Board's April 11, 2011 FDO remanded portions of the County's comprehensive plan to
14 the County for compliance with the GMA. In response the County took a number of steps to
15 achieve compliance, specifically: the County adopted Ordinance No. 2011-034 on August 9,
16 2011 which amended the Whatcom County Comprehensive Plan to reduce the size of the
17 Ferndale UGA by 580 acres and adopted amendments to the fire protection and sewer
18 provisions of the Whatcom County 20-Year Capital Facilities Plan. These measures directly
19 and appropriately addressed the areas of non-compliance which the Board identified in the
20 FDO. Petitioners have made no objection to a finding of compliance and an order to that
21 effect will be entered.
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1 **V. ORDER**

2 Based on the foregoing, the Board finds Whatcom County has appropriately addressed the
3 areas of non-compliance with the Growth Management Act identified in the April 11, 2011
4 FDO. Accordingly, the County is found to be in compliance with the GMA and this case is
5 CLOSED.
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7 Entered this 6th day of October 2011.
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10 _____
James McNamara, Board Member

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12 _____
William Roehl, Board Member

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14 _____
Nina Carter, Board Member
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17 Pursuant to RCW 36.70A.300 this is a final order of the Board.⁵
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21 ⁵ Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this
22 Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration,
23 together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise
24 delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy
25 served on all other parties of record. Filing means actual receipt of the document at the Board office.
RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a
prerequisite for filing a petition for judicial review.

26 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior
27 Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition
28 in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and
29 Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and
30 served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the
31 final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail,
32 but service on the Board means actual receipt of the document at the Board office within thirty days after
service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic
mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW
34.05.010(19)